Supreme Court, U.S.
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No. 92-1129

In the Supreme Court of the United States

OCTOBER TERM, 1992

PAUL S. CHENG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's convictions for interstate transportation of money obtained by fraud, in violation of 18 U.S.C. 2314.

2. Whether the evidence was sufficient to establish that petitioner knew that the money he transported was taken by fraud.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 970 F.2d 1397.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 1992. A petition for rehearing was denied on September 29, 1992. Pet. App. 19a-20a. The petition for a writ of certiorari was filed on December 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Texas, petitioner was convicted on two counts of bank fraud, in violation of 18 U.S.C. 1344; one count of wire fraud, in violation of 18 U.S.C. 1343; one count of misapplication of money belonging to a federally insured financial institution, in violation of 18 U.S.C. 657; two counts of making false entries in the books and records of a federally insured financial institution, in violation of 18 U.S.C. 1006; and four counts of interstate transportation of money taken by fraud, in violation of 18 U.S.C. 2314. Petitioner was acquitted on five other counts of interstate transportation of money taken by fraud. Gov't C.A. Br. 2 & nn.1, 2, 17.

Petitioner was sentenced to 30 years' imprisonment, and he was ordered to pay $7,874,880 in restitution, for which he and his co-defendant, Simon Heath, were made jointly and severally liable. Gov't C.A. Br. 2. The court of appeals affirmed in part and reversed in part. It found the two counts of bank fraud to be multiplicitous, and it therefore remanded for dismissal of one of the bank fraud counts and for resentencing. Pet. App. 18a.

1. Petitioner and Heath founded Pacific Realty Corporation (PRC), a real estate development company. In 1984, petitioner, Heath, and PRC acquired Guaranty Federal Savings & Loan, a federal savings and loan located in Dallas. At the time, Guaranty was in receivership. The purchase agreement contained a provision exempting Guaranty from regulations prohibiting loans to insiders such as PRC and its clients. Pet. App. 1a-2a.

Soon after acquiring Guaranty, PRC bought 42 acres of land in Florida. A series of events, including a sewer moratorium imposed by local authorities, disrupted PRC's plans to develop the land. Petitioner and Heath

attempted to sell the Florida land, but they were unsuccessful in the effort. Pet. App. 2a.

In December 1985, petitioner and Heath arranged a complex transaction with Don Farris, who owned a real estate development company in Arizona. Farris, a major borrower from Guaranty, agreed to purchase almost 30 acres of the Florida property for $10 million; the funds for the purchase were to be loaned to him by Guaranty. Under the terms of the loan, the debt would be nonrecourse, and the only collateral would be the property that was purchased. Farris would then set up an account at Guaranty to pay interest on the loan. The funds for that account would be provided from the sale to PRC of property Farris owned in Arizona. To pay the $3.3 million purchase price for the Arizona property, PRC would borrow $3.3 million from Guaranty and secure the loan with the property. Pet. App. 2a.

The $10 million loan from Guaranty to Farris required that the Florida property be appraised at $11 million. When petitioner and Heath had earlier attempted to sell the land, however, its value was set at less than half that amount. In an effort to obtain a favorable appraisal, Heath, in the presence of petitioner and another PRC employee, directed Ben Romero, an officer of PRC, to secure an appraisal on an "as built basis" by informing the appraisers that two highrise apartment towers would be built on the land. At the time, petitioner and Heath had no intention of building the highrises. Based on that misrepresentation, Romero obtained a preliminary opinion letter from Marshall & Stevens, an appraisal firm, appraising the land at $11.2 million. The appraisal firm was not aware of how its preliminary letter was going to be used, and the letter was technically insufficient to be used as support for the loans that Guaranty was to make to enable the transaction to go forward. PRC and Farris nonetheless closed the deal, using the preliminary

appraisal letter. The next day, petitioner and Heath got Marshall & Stevens to send PRC a corrected, back-dated appraisal letter, addressed to Guaranty and appraising only the 30 acres of the Florida property that was sold to Farris. Pet. App. 2a-3a.

Although Marshall & Stevens sent a corrected version of the preliminary appraisal, it was not able to provide Guaranty with the required full narrative appraisal to verify its initial $11.2 million estimate of the property's value. In light of the local restrictions on development, one Marshall & Stevens' appraiser suggested that the property was worth less than half of the $11.2 million evaluation. In March 1986, the Federal Home Loan Bank discovered that the loan had been made without the required full narrative appraisal. Pet. App. 3a.

To provide a factual basis for the $11.2 million appraisal figure, Romero made false representations to Marshall & Stevens about the development potential of the Florida property, including assurances that sewer and treatment facilities could be built, that local zoning laws permitted the building of the proposed highrise apartment towers, and that it was physically possible to build highrises on the land. Based on those misrepresentations, Marshall & Stevens provided the required full narrative appraisal placing the property's value at $11.2 million. Pet. App. 3a.

At trial, the government established that petitioner and Heath deposited $6,053,204.93 of the fraudulently obtained Florida loan proceeds into an account containing $454,518.49 of untainted funds. Shortly thereafter, petitioner and Heath placed in that same account an additional $332,162.50 of untainted funds. Thus, between January 21, 1986, and February 25, 1986, more than $6 million of the approximately $6.8 million in the account consisted of the fraudulently obtained loan proceeds. On ten separate occasions between February 4 and

February 25, 1986, petitioner and Heath transferred a total of $2,155,408 from the account to a New York stockbroker. Pet. App. 8a; C.A. App. 200909-200917.

2. Petitioner and Heath were charged in a 17-count indictment. Count 1 alleged conspiracy, and Counts 2 and 3 alleged bank fraud based on the loans for $10 million and $3 million procured from Guaranty. Counts 4 through 7 alleged wire fraud, misapplication of funds, and false entries. The final ten counts were for interstate transportation of funds obtained by fraud, in violation of 18 U.S.C. 2314, based on the use of funds obtained through the Florida deal to purchase stock from the New York broker. The jury convicted petitioner on four of the ten interstate transportation counts. Pet. App. 3a-4a. It is those four convictions that petitioner challenges here.

3. The court of appeals affirmed. The court rejected petitioner's claim that the interstate transportation convictions were invalid because the bank account contained sufficient untainted funds to cover each wire transfer considered in isolation. The court held that "it is obvious that the $799,281.55 [in untainted funds in petitioner's account] could not have covered all of the transfers [from the account] to New York." Pet. App. 8a. In the course of the ten wire transfers at issue, "[a]t least $1,356,126.45 in tainted funds was transferred to New York." *Ibid.* The court noted that "[i]t defies logic to require that the Government trace these tainted funds through each transfer," because "[s]uch proof is impossible" in light of the fungibility of money. *Id.* at 8a-9a.

The court of appeals also rejected petitioner's claim that the evidence was insufficient to support his convictions on the interstate transportation counts because there was no direct evidence that he had knowledge of the transfers. The court held:

> Viewed in the light most favorable to the verdict, the evidence established that [petitioner] oversaw the financial affairs of PRC and was aware of the stock purchases. In this light, the evidence permits the inference that he understood how those purchases would be paid for.

Pet. App. 9a.

ARGUMENT

1. Petitioner claims (Pet. 6-17) that the court of appeals erred in concluding that the government met its burden of proving that each interstate transportation count on which he was convicted involved at least $5000 of fraudulently obtained funds. That claim is without merit.

a. Under the terms of 18 U.S.C. 2314 each count of the indictment against petitioner had to allege one or more interstate wire transfers involving a combined total of at least $5000.* Under this Court's decision in *Schaffer* v. *United States*, 362 U.S. 511, 517-518 (1960), the government may not aggregate multiple counts of an indictment to meet the $5000 threshold, although multiple transfers may be aggregated within each count. See also *United States* v. *Martin*, 800 F.2d 560, 562 (6th Cir. 1986); *United States* v. *Drebin*, 557 F.2d 1316, 1328 n.19 (9th Cir. 1977), cert. denied, 436 U.S. 904 (1978).

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* Section 2314 provides in pertinent part:

> Whoever transports, transmits, or transfers in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud * * * [s]hall be fined not more than $10,000 or imprisoned not more than ten years, or both.

The government did not aggregate funds involved in separate wire transfers in order to meet the $5000 requirement of Section 2314. Each count in which petitioner was accused of transporting fraudulently obtained goods—in this case, cash—involved a single transfer of far more than $5000. Because the government did not aggregate the amounts involved in multiple wire transfers or counts in order to prove its case against petitioner, it fully satisfied the requirements of this Court's decision in *Schaffer*.

b. Petitioner argues that the account from which the wire transfers were made included both tainted and untainted funds, and that the government was required to prove that each transfer from the account involved at least $5000 that could be specifically identified as tainted funds. The court of appeals correctly rejected that claim.

No court of appeals has held that, in cases in which the defendant has commingled tainted and untainted funds in a single account, each count of the indictment must allege a transfer of funds exceeding the amount of untainted money in the account. In *United States* v. *Cardall*, 885 F.2d 656, 674 (10th Cir. 1989), the court refused to accept the same claim that petitioner makes here, *i.e.*, "that the government did not prove its case because it failed to trace the money which crossed state lines through the commingled funds in the operation's multiple bank accounts." The court rejected the view that "funds involved in the interstate transfers must be presumed 'innocent' funds," holding instead that "circumstantial evidence overwhelmingly supports a finding that the significant majority of [the] funds were obtained by fraud." *Id.* at 674-675; see also *United States* v. *Weiner*, 755 F. Supp. 748, 753-754 (E.D. Mich. 1991) (citing and following *Cardall*).

As was true in *Cardall*, in this case it is reasonable to infer, in light of the great preponderance of tainted money in the account and the large amount of fraudulently obtained funds that were transported across state lines, "that the significant majority of [the] funds were obtained by fraud." 885 F.2d at 675. See also *United States* v. *Banco Cafetero Panama*, 797 F.2d 1154, 1158-1160 (2d Cir. 1986) (allowing forfeiture of narcotics proceeds commingled in a single account with untainted money). When the tainted funds were deposited into petitioner's account, the tainted funds made up more than $6 million of the $6.5 million in the account. Subsequent deposits of untainted funds brought the total of untainted funds in the account to approximately $799,000. If the tainted and untainted funds were allocated to each interstate transfer according to their respective shares of the sum in the account, approximately 90% of each transfer would be allocated to the tainted funds. Since the amounts of the interstate transfers were far in excess of $5000—the amounts involved in the counts of conviction ranged from $199,000 to $459,000—a proportional allocation of the tainted and untainted funds to each transfer would result in the interstate transportation of far in excess of $5000 of tainted funds in connection with each of the counts on which petitioner was convicted.

Petitioner's reading of the statute would permit enterprising criminals to shield themselves from prosecution under Section 2314 simply by commingling tainted and untainted funds. As this Court has stated, Congress enacted Section 2314 to "com[e] to the aid of the states in detecting and punishing criminals whose offenses are complete under state law, but who utilize the channels of interstate commerce to make a successful getaway and thus make the state's detecting and punitive processes impotent." *McElroy* v. *United States*, 455 U.S. 642, 654 (1982) (internal quotation omitted). If accepted, peti-

tioner's interpretation would enable "sophisticated criminals * * * to spirit stolen funds from one state to another through the use of checking accounts," permitting them to "remain immune from federal criminal laws [and] remove the proceeds of their wrongdoing from the jurisdiction of the state where the offense took place." *United States* v. *Levy*, 579 F.2d 1332, 1337 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979); see also *McElroy*, 455 U.S. at 654-655 (rejecting an interpretation of Section 2314 under which "a patient forger easily could evade the reach of federal law, yet operate in the channels of interstate commerce"); *Moskal* v. *United States*, 498 U.S. 103, 113 (1990) (Section 2314 "should be construed broadly").

c. Petitioner claims (Pet. 9) that the decision below conflicts with the decision of the Eighth Circuit in *United States* v. *Lagerquist*, 724 F.2d 693 (1984). That case, however, is readily distinguishable.

In *Lagerquist*, the government charged the defendant with five counts of violating Section 2314, based on the defendant's interstate shipment of five loads of fraudulently obtained goods. None of the loads, however, was worth as much as $5000, although in the aggregate the value of the goods exceeded that amount. Applying this Court's decision in *Schaffer*, the court of appeals held that the indictment was invalid because each count of the indictment did not allege the interstate transportation of goods valued at $5000 or more. 724 F.2d at 694-695. By contrast, each wire transfer and each count of the indictment in this case involved much more than $5000 of fraudulently obtained funds. Accordingly, if this case had arisen in the Eighth Circuit, *Lagerquist* would not have required a different result.

2. Petitioner also claims (Pet. 17-26) that the evidence was insufficient to support the jury's verdict that he knew the money transferred from his account to New

York was obtained by fraud, and that his convictions therefore amount to imposition of vicarious liability for the criminal acts of others. That claim lacks merit.

The evidence established that petitioner, a sophisticated businessman, was primarily concerned with the financial aspects of PRC, while his partner, Heath, was concerned with the development aspects of the company. Gov't C.A. Br. 3, 22. The evidence showed that petitioner was personally involved in the fraudulent transaction with Farris and that he was present when Heath directed Romero to obtain a false appraisal on the Florida land. The evidence also showed that petitioner was directly involved in the interstate transfer of the fraudulently obtained funds. Petitioner's assistant, Paul Thompson, testified that petitioner would call his broker and place orders for securities himself, and then instruct Thompson to pay for the trades. *Id.* at 22. Based on that evidence, it was reasonable for the jury to conclude that petitioner knew the funds used to pay for the stock were obtained by fraud, and that he caused those funds to be transferred to the New York broker.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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